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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DE-LORENZO-INTERSTATE WASTE REMOVAL CO., INC. (NOW INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey

BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Are solid and liquid wastes and the services related to their disposal in interstate commerce?

2. Does a state statute which prohibits the entry into the state of solid or liquid wastes collected outside the state (except for garbage to be fed to swine) discriminate against or place an undue burden on interstate commerce?

3. Is a state statute which prohibits the entry into the state of solid or liquid wastes collected outside the state (except for garbage to be fed to swine) inconsistent with the Federal scheme for such wastes as expressed in the Federal Solid Waste Disposal Act, as amended?

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of the Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The American Public Health Association (hereinafter "APHA") has received consent from the parties to file this brief as amicus curiae; the consent letters are on file with the clerk.

APHA is a non-profit corporation organized under the laws of Massachusetts. Its national membership consists of approximately 29,000 public health professionals. APHA's objective is the protection and promotion of public health by means which include environmental controls. It has a strong interest in promoting rational planning at the local, state, regional, and national levels of government through strong regulations and land use planning legislation which accomplish the effective and efficient disposal and recycling of solid wastes in a manner which adequately protects public health and the environment.

APHA is concerned that regulation of the environment in the name of public health be efficient and effective. The public health impact of solid and liquid wastes can adequately be minimized by the licensing of landfill sites and operators and a system of requirements and inspections directed at the nuisance and disease potential of such sites. However, while recognizing the appropriateness of a state's concern with land preservation as an independent public policy objective, APHA believes that a flat prohibition against the importation of solid wastes suffers from overbreadth as a policy instrument. Public health protection and land preservation objectives both can be served by less burdensome systems of regulation more precisely, efficiently, and effectively tailored to the objectives.

APHA also believes that the unwanted public health and land use impacts occasioned by the land disposal of solid wastes (as with other "pollutants") do not respect political boundaries, particularly in and around densely populated urbanized areas. Therefore, rational planning and regulation demand cooperation among governments rather than conflict based on artificial boundaries. The Congress apparently shares this view, for the Solid Waste Disposal Act, as amended, provides a Federal commitment to inducing cooperation among governments as a means to achieve public health protection and land preservation, as well as recycling, in connection with solid and liquid wastes. APHA believes this federal scheme must not be undercut by states' efforts to erect burdensome and discriminating artificial barriers against cooperation.

APHA therefore believes that the related goals of public health protection and land preservation can best be served by fostering the development of mutually accommodating policies about solid and liquid waste disposal among governments, and herewith submits its views on the legal issues to this Court for its assistance.

ARGUMENT

I

SOLID AND LIQUID WASTES AND THE SERVICES RELATED TO THEIR DISPOSAL ARE IN INTERSTATE COMMERCE

This issue is raised by appellee's argument below and to this Court that the collection, treatment, transportation, and disposal of solid and liquid wastes are not in interstate commerce and thus do not fall within the ambit of the commerce clause of the Constitution, Article I, Section 8. The argument appears to be that such wastes are not commercially valuable and are allegedly injurious to public health.

It is at best inaccurate to rely upon a distinction between valuable and valueless solid and liquid wastes, as suggested by appellees and the New Jersey Supreme Court below, 68 N.J. at 468. This Court has recognized the authority of a state to prohibit introduction into its territory of inherently disease-producing articles and substances, but at the same time held that this authority does not extend to merchantable articles. *Bowman v. Chicago &c. Railway Co.*, 125 U.S. 465, 488-489 (1888). Thus the intrinsic nature of articles is an inappropriate basis for a state's prohibition against those articles; it is proper to distinguish the decisions of this Court holding that "non-merchantable" items are not "commerce" (e.g., *Clason v. Indiana*, 306 U.S. 439 (1939) [animal carcasses]; *Asbell v. Kansas*, 209 U.S. 251 (1908) [unhealthy swine or cattle]; *Crossman v. Lurman*, 192 U.S. 189 (1904) [noxious or decayed foods]; *Sligh v. Kirkwood*, 237 U.S. 52 (1915) [immature citrus fruit]) as aimed at protecting the public from mistaking those food and drug items as fit foods and to prevent the spread of disease. See the New Jersey trial court's decision in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N.J. Super. 160, 169-70, 316 A.2d 711 (CH. 1974).

Therefore, the recognition that solid and liquid wastes may be of mixed merchantable character is sufficient to bring them within the protection of the interstate commerce clause; such a recognition does not deny a state sufficient authority to protect public health. However, it seems clear from the New Jersey Supreme Court's opinion that the purpose of the statute at issue was not to protect public health but to preserve landfill capacity. 68 N.J. at 465 n.10. It is insufficient for a state to allege public health protection when the officially-recognized purpose does not include it. It can only be, then, that nonmerchantability is the only argument which supports the New Jersey statute on this issue. This argument amounts to a conclusion that less intrusive measures are available to a state to perform its police power functions without trying to exclude an article as being "valueless." This conclusion preserves the state's essential and important authority to take appropriate prohibitory action where such action is most effective and efficient.

This Court should therefore hold that appellee's argument below and to this Court, and the decision of the New Jersey Supreme Court below, are in error in concluding that the absence of commercial value of an article is sufficient to remove that article from the protection of the interstate commerce clause, and that the assertion of public health protection purpose, without more, does not justify a conclusion of nonmerchantability.

II

A STATE STATUTE WHICH PROHIBITS THE ENTRY INTO THE STATE OF SOLID AND LIQUID WASTES COLLECTED OUTSIDE THE STATE DISCRIMINATES AGAINST AND PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE

The state interest arguably sought to be advanced by New Jersey, the protection of public health and welfare, is clearly legitimate. However, the question is whether the burden imposed on the interstate commerce of solid waste collection, transportation, treatment, and disposal is excessive. This Court recently reiterated the proper test to be applied to state statutes affecting interstate commerce:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Huron Cement Co. v. Detroit,* 362 U.S. 400, 443, 80 S. Ct. 813, 816, 4 L.Ed. 2d 852. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed. 2d 174 (1970) [footnote omited].

Great Atlantic & Pacific Tea co. v. Cottrell, 424 U.S. 366, 371, 96 S. Ct. 923, 928, 47 L. Ed. 2d 55, 61 (1976).

The New Jersey statute at issue here clearly discriminates against solid and liquid wastes based solely on their origin or collection outside New Jersey. However, the most cogent issue is whether this discrimination imposes an undue burden on interstate commerce despite New Jersey's legitimate interests in

protecting public health and preserving land. The New Jersey Supreme Court asserted below that *Huron Cement Co. v. Detroit, supra*, stood for the proposition that "the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of [the state's police] power." 68 N.J. at 473. However, the ordinance in *Huron* did not involve discrimination as it was applicable to "any person, firm, or corporation" operating within Detroit, and this Court clearly pointed out that the discrimination argument was not even made. 362 U.S. at 448. Here, New Jersey's action against wastes originating outside the state did not impose equally stringent burdens on wastes originating inside the state; apparently, public health can be protected and land preservation can be accomplished by sufficiently effective means if only New Jersey trash is involved.

Though public health and land preservation are legitimate state objectives, the discrimination against out-of-state wastes New Jersey seeks to impose require that the state justify the heavy burden, according to the test laid down in *Great Atlantic & Pacific Tea, supra*. Clearly the burden on interstate commerce involved here is not merely incidental, and there it must be determined whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...", *Huron Portland Cement Co., supra* at 443, and whether the state's interest "could be promoted as well with a lesser impact on interstate activities...", *Pike v. Bruce Church, supra* at 142. The New Jersey Supreme Court clearly recognized the "true reason" for enactment of the statute in question here was not public health protection, but preventing the acceleration of depletion of existing landfills. 68 N.J. at 465 n.10. With respect to the land preservation purpose, the New Jersey Supreme Court referred to several landfill capacity studies made in various areas of the state (which are difficult to reconcile) but apparently accepted (without providing documentation) that "a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8% ...." 68 N.J. at 461. Even recognizing local variation, it is clear

that the prohibition against out-of-state wastes will not extend landfill life beyond a very modest amount.

Therefore the issue is whether, given the insubstantial contribution to land preservation provided by the prohibition, the state of New Jersey considered and evaluated adequate alternatives. The record in this case is bare of consideration of such alternatives such as requiring more compacting methods of disposal and the utilization of landfill sites outside the state of New Jersey. The failure to evaluate these alternatives and to compare their benefits to the putative benefits of a prohibition against out-of-state wastes is a defect of constitutional magnitude, particularly where Congress itself has declared it a national policy to foster the use of such alternatives. The Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 et seq. (1976).

Thus this Court should conclude that New Jersey P.L. 1973, c. 363, N.J.S.A. 13: 1I-10, is unconstitutional as discriminatory against and an undue burden on interstate commerce.

III

A STATE STATUTE WHICH PROHIBITS THE ENTRY INTO THE STATE OF SOLID OR LIQUID WASTES COLLECTED OUTSIDE THE STATE IS INCONSISTENT WITH THE FEDERAL SCHEME FOR SUCH WASTES

Congress, in Solid Waste Disposal Act, 42 U.S.C. 3251 et seq., as amended by the Resource Conservation and Recovery Act of 1976, 90 STAT. 2795 (1976), now codified at 42 U.S.C. 6901 et seq., found that

> ...while the collection and disposal of solid wastes should continue to be primarily the function of state, regional, and local agencies, the problems of waste disposal...have become a matter national in scope and in concern and necessitate Federal action....

42 U.S.C. 6901(a)(4). The New Jersey Supreme Court, on remand from this court to consider the question of whether the then-newly-enacted Resource Conservation and Recovery Act, *supra,* pre-empts the New Jersey statute at issue, correctly concluded that no pre-emption occurred. 75 N.J. 562, 376 A. 2d 888 (1977).

However, this Court has recognized that a state policy may be sufficiently inconsistent with a federal policy or objective so as to be invalid, *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 581 (1942), or to present a sufficient obstacle to the achievement of a federal objective as to be invalid. *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941). While it is clear that the Solid Waste Disposal Act, as amended, *supra,* does not occupy the field, the various programs for solid waste disposal regions and plans, while involving only federal guidelines and technical and financial assistance, clearly evince a desire by Congress to foster cooperation among governments. 42 U.S.C. 6941. Interstate cooperation is also a goal of the statute, including the formation of interstate compacts. 42 U.S.C. 6904. Finally, federal support is provided for "the development, demonstration, and application of new and improved methods and processes to reduce the volume of waste and unsalvageable materials and to provide for proper and economical solid-waste disposal practices." 42 U.S.C. 6901(a)(4). See also 42 U.S.C. 5001-5004 (resource recovery technology) and 8001-8006 (research, development, and demonstration).

Avoiding "rivalries and reprisals" appears to be the purpose of both the commerce clause, *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. at 522 (1935) and the Solid Waste Disposal Act, as amended, *supra*. To uphold the New Jersey prohibition here at issue would invite retaliatory action which would seriously impair the federal objectives stated above. Indeed, the Commonwealth of Pennsylvania has enacted legislation to prevent disposal in Pennsylvania of solid waste collected in another state that does not accept solid waste from

Pennsylvania. 35 P.S. 6007 et seq. The state of Maine has enacted a prohibition against out-of-state waste similar to New Jersey's. Maine Rev. Stat. Ann. Title 17, Sec. 2253. This type of prohibition, which is apparently increasing, clearly frustrates the attainment of both the commerce clause and federal policy, which is a sufficient inconsistency to justify invalidating the New Jersey statute.

CONCLUSION

New Jersey P.L. 1973, 1973, ch. 363 was enacted solely to impede the flow of commerce in solid and liquid wastes. These wastes have sufficient valuable content so as to be merchantable, and the state does not do more than allege a public health protection purpose. The prohibition unduly burdens interstate commerce, and the state has not demonstrated adequate consideration of available, adequate, and less burdensome alternatives. In addition, the use of such an approach will frustrate the achievement of federal policy by making cooperative efforts to deal with the very real public health and land preservation problems impossible. The prohibition cannot be validated under the Constitution.

Respectfully submitted,

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